ances where the directors had acted in a manner which was unfair or unjust, ie the second limb of s 218(1)(f) of the Act.

First, it was said that the directors resorted to circular resolutions, instead of board meetings to decide on projects and expenditure. Regarding such circular resolutions, the petitioners' point was not that the use of such circular resolutions was ultra vires the memorandum and articles of association but was rather to show the dictatorial fashion of one of the directors. The fact that another of the directors had refused to sign a circular resolution, in respect of one Sandalwood Farms Pty Ltd, would in my view, amount to a vote against the acquisition of Sandalwood Farms Pty Ltd in question. Generally speaking, a resolution of the board of directors would usually be carried by more votes for it than against it. That dissenting director was most probably overruled by the majority of directors and nobody had suggested that that dissenting director had even intended to take any proceedings in court. Nothing improper had been proved again.

None of the complaints had been proved to my satisfaction so as to bring in the operation of s 218(1)(f) or s 218(1)(i). Assuming that they were proved, none of such complaints could be sufficient to amount to any infringement of the rights of the petitioners under the two grounds. Assuming further that the transactions set out by the petitioners were such infringements, the extent of such infringements, or to be more precise, the extent of such unfairness or unjustness, etc was not such as to induce the court to exercise its discretion to order a winding-up of the company. The company, though not a dynamic one, was nonetheless, having regard to undisputed allegations, a prosperous and successful one.

In the circumstances and for the reasons stated the petition was dismissed with costs.

Petition dismissed.

Solicitors: *Shook Lin & Bok*; *Kean Chye & Sivalingam.*

Reported by *Wong Kim Fatt*

Palmex Industries Sdn Bhd v Public Prosecutor

HIGH COURT (PENANG) – CRIMINAL APPEAL NO 51-81-88
WAN ADNAN J
13 FEBRUARY 1989

Labour Law – Permitting employee to work more than 12 hours in one day – Offence of – Complainants were shift workers – Definition of 'day' – Whether it starts from time of first shift or time work actually started – Prohibition against working more than 12 hours a day – Whether directed against employer or employee – Employment Act 1955, ss 2, 60A & 60C

Words and Phrases – 'Day' – Employment Act 1955, s 2

The appellant was charged with two counts of permitting two employees A and T, to work more than 12 hours in contravention of s 60C(2) of the Employment Act 1955 ('the Act'). The appellant was found guilty on both charges in the trial court and was fined $300 for each charge. He appealed to the High Court against that decision.

The appellant was running a 24-hour continuous operation which was divided into three shifts of 7am-3pm, 3pm-11pm and 11pm-7am. Both A and T were shift workers. A worked from 3pm to 11pm on 6 April 1986 and from 7am to 3pm on 7 April 1986. He thus worked for 16 hours between 3pm on 6 April and 3pm on 7 April 1986. T worked from 3pm to 11pm on 28 April 1986 and from 7am to 3pm on 29 April 1986. He thus worked for 16 hours between 3pm on 28 April 1986 and 3pm on 29 April 1986. In his grounds of appeal, the appellant contended that (a) it was the employee who committed the offence as the prohibition under s 60C of the Act that 'no employee who is engaged ... shall work for more than 12 hours in any one day' was directed against the employee; (b) the word 'day' for all its shift workers started at 7am, the start of the first shift, and as such, A and T had not worked for more than 12 hours in any 'one' day; (c) the appellant was justified under s 60A(2)(e) as the offence section of s 60C(2) provided for the exception stated in s 60A(2)(e). The appellant argued T had worked from 7am to 3pm on 29 April 1986 because he changed his shift with a friend and the change was allowed by the appellant so as not to cause an interruption of work.

Held, dismissing the appeal:

(1) Under s 60C(1) a shift worker may be required by his employer to work more than eight hours in any one day. Section 60C(2) then limits the number of hours to 120.

(2) Section 60(C) must be read with s 60(A) of the Act. Reading the two sections together, there is clearly a provision that an employer cannot require an employee to work more than eight hours in one day but if the employee is a shift worker the employer may require him to work more than eight hours in any one day subject to the maximum of 12 hours. Therefore if an employer requires an employee to work for more than 12 hours in any one day he contravenes this provision and he can be punished under s 99A of the Act.

(3) The word 'day' is defined in s 2 of the Act. Under that definition, if a shift worker starts his work at 7am on a certain day, a 'day' in relation to him will be a continuous period of 24 hours from that time. In the present case, A started work at 3pm on 6 April 1986. The 'day' in relation to him was therefore a continuous period of 24 hours from 3pm on 6 April 1986. His 'day' ended at 3pm on 7 April 1986. During this period, he worked for 16 hours. T's 'day' was from 3pm on 28 April 1986

to 3pm on 29 April 1986. T also worked for 16 hours during this period.

(4) The court does not agree with the appellant's third contention. Section 60A(2)(e) is not meant for a situation in the present case. It is meant for a situation where there is an interruption of work which is impossible to foresee. Here, the interruption, if any, was clearly foreseeable.

[*Editorial Note*: The appellant has appealed to the Supreme Court vide Criminal Appeal No 07-4-89.]

Legislation referred to
Employment Act 1955 ss 2, 60A, 60C, 99A

TM Varughese for the appellant.
Mohd Bazain bin Idris (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Wan Adnan J: The appellant was charged in the Magistrate's Court, Butterworth for the following:

First charge

That you on 6 April 1986 at Palmex Industries Sdn Bhd, Prai, being the employer of Abbas Bin MK Shaik Mohd, NRIC No 4451759, an employee, did permit the said employee to work more than 12 hours on the said date to wit, from 3.00pm on 6 April 1986 to 3.00pm on 7 April 1986, in contravention of s 60C(2) of the Employment Act 1955 and have thereby committed an offence punishable under s 99A of the same Act thereof.

Second charge

That you on 28 April 1986 at Palmex Industries Sdn Bhd, Prai, being the employer of Teoh Soon Hin, NRIC No 5035885, an employee, did permit the said employee to work more than 12 hours on the said date to wit, from 3.00pm on 28 April 1986, to 3.00pm on 29 April 1986 in contravention of s 60C(2) of the Employment Act 1955 and have thereby committed an offence punishable under s 99A of the same Act thereof.

The appellant was found guilty on both charges and was fined $300 for each charge. The appellant appeals against the whole of the decision.

The facts of the case are not disputed. The appellant was the employer of Abbas bin MK Shaik Mohd ('Abbas'), the complainant in the first charge and Teoh Soon Hin ('Teoh') the complainant in the second charge. They were both shift workers. The appellant was running a 24-hour continuous operation which was divided into three shifts as follows: 7.00am to 3.00pm; 3.00pm to 11.00pm; 11.00pm to 7.00am.

On 6 April 1986 Abbas worked from 3.00pm to 11.00pm. He worked again on 7 April 1986 from 7.00am to 3.00pm. Teoh worked from 3.00pm to 11.00pm on 28 April 1986 and worked again on 29 April 1986 from 7.00am to 3.00pm. Abbas worked for 16 hours between 3.00pm on 6 April 1986 and 3.00pm on 7 April 1986 and Teoh worked for 16 hours between 3.00pm on 28 April 1986 and 3.00pm on 29 April 1986.

Section 60C of the Employment Act 1955 states as follows:

60C Shift work

(1) Notwithstanding s 60A(1)(b) and (d) but subject to subs (1)(a) thereof, an employee who is engaged under his contract of service in shift work may be required by his employer to work more than eight hours in any one day or more than forty-eight hours in any one week but the average number of hours worked over any period of three weeks shall not exceed forty-eight per week.
(2) Except in the circumstances described in s 60A(2)(a), (b), (c), (d) and (e), no employee who is engaged under this contract of service in shift work shall work for more than twelve hours in any one day.

One of the grounds of appeal was that under s 60C of the Act no offence was committed by the employer. It was submitted that it was the employee who committed the offence. The prohibition 'no employee who is engaged ... shall work more than twelve hours in any one day' is directed against the employee.

Section 60C must be read with s 60A of the Act which provides as follows:

60A Hours of work

(1) Except as hereinafter provided, an employee shall not be required under his contract of service to work –
(a) more than five consecutive hours without a period of leisure of not less than thirty minutes duration;
(b) more than eight hours in one day;
(c) in excess of a spread over period of ten hours in one day;
(d) more than forty-eight hours in one week:

This section stipulates the maximum number of hours an employee can be required to work. Section 60C(1) provides the exception for shift workers. A shift worker may be required by his employer to work more than eight hours in any one day. Subsection (2) of s 60C then limits the number of hours to twelve.

Reading the two sections together there is clearly a provision that an employer cannot require an employee to work more than eight hours in one day but if the employee is a shift worker the employer may require him to work more than eight hours in any one day subject to the maximum of 12 hours. Therefore if an employer requires an employee to work for more than 12 hours in any one day he contravenes this provision and he can be punished under s 99A of the Act which is wide enough to cover this contravention.

The other ground of appeal involves the interpretation of the word 'day' as applicable to shift workers. Under s 2 of the Act 'day' means:

(a) a continuous period of twenty-four hours beginning at midnight; or
(b) for the purposes of Part XII in respect of an employee engaged in shift work, a continuous period of twenty-four hours beginning at any point of time;

The appellant contended that the 'day' for all their shift workers started at 7.00am, the start of the first shift. Even for the shift worker who started work at 3.00pm his 'day' was also from 7.00am that day. This had been fixed by the company. Therefore Abbas and Teoh had not worked for more than 12 hours in one 'day'.

A 'day' for a shift worker is a continuous period of 24 hours beginning at any point of time. 'At any point of time' means the time he starts his work on a particular day. If he starts his work at 7am on a certain day, a 'day' in relation to him will be a continuous period of 24 hours from that time. If on another day he starts his work at 11.00pm his 'day' will be a continuous period of 24 hours from that time. An employer cannot fix the 'day' for his shift workers.

Abbas started work at 3.00pm on 6 April 1986. The 'day' in relation to him was therefore a continuous period of 24 hours from 3.00pm on 6 April 1986. His 'day' ended at 3.00pm on 7 April 1986. During this period he worked for 16 hours. Teoh's 'day' was from 3.00pm on 28 April 1986 to 3.00pm on 29 April 1986. Teoh also worked for 16 hours during this period.

The other ground of appeal was that the learned magistrate did not give effect to s 60A(2) of the Act.

Section 60C(2) starts with the words 'Except in the circumstances described in s 60A(2)(a), (b), (c), (d) and (e) no employee...'

It was contended (and it was admitted by Teoh) that Teoh worked on 29 April 1986 from 7.00am to 3.00pm because he wanted to help his friend. He changed his shift with a friend. The change was allowed by the appellant because it had no choice. If a request for change was not allowed the employee could just absent himself and that would cause an interruption of work. It was submitted that the appellant was therefore justified under s 60A(2)(e).

I did not agree to this. Section 60A(2)(e) is not meant for a situation like this. It is meant for a situation where there is an interruption of work which is impossible to foresee. Here, the interruption, if any, was clearly foreseeable.

For the above reasons I dismissed the appeal.

Appeal dismissed.

Solicitors: *TM Varughese & Co.*

Reported by *Ng Sheau Jiuan*

Ghulam Mohammad Sayeed & Ors v Perwira Habib Bank (Malaysia) Bhd & Ors

HIGH COURT (KUALA LUMPUR) – SUIT NO D4-22-206-88
ZAKARIA YATIM J
19 DECEMBER 1988

Civil Procedure – Ex parte application – Injunction – Order in terms – Draft order not in terms of application – Draft order approved – Time prescribed in order for making an application to set it aside – Whether peremptory order – Application made out of prescribed time by defendant to set aside order – Whether defendant precluded from doing so – Defendant also applying for injunction in the proceedings and obtaining Mareva injunction in separate proceedings – Whether estopped from proceeding with instant application – Doctrine of election – Rules of the High Court 1980, O 32 r 6

On 29 September 1988, the plaintiffs in this action filed the writ of summons. On the same date, the first and second plaintiffs filed an application by summons-in-chambers for various orders including for certain injunctions against some of the defendants. The application was heard ex parte the same day by the judge who made an 'order in terms of prayers (a), (b), (c) and (d)' of the summons-in-chambers and then approved a draft order submitted by counsel. In approving the draft order, the judge overlooked the last part of it which read as follows:

'And it is ordered that upon the writ of summons, summons-in-chambers and affidavit-in-support being served on the defendants, they be at liberty to apply to set aside or vary this order within two (2) weeks from the date thereof.'

The order was later signed by the senior assistant registrar of the court. The last part of the order was not in one of the prayers in the summons-in-chambers and the judge had not made such an order after hearing counsel. The judge did not make any order in respect of prayer (d) of the summons-in-chambers which was for further or other relief.

On 25 October 1988, the first defendant applied for an order, inter alia, that: (a) time be extended further to that allowed by the ex parte order to enable the first defendant to make the application; and (b) that the injunction and related orders granted on 29 September 1988 be set aside. At the hearing of the first defendant's application, counsel for the plaintiffs raised a preliminary objection. Counsel relied on the last part of the ex parte order and also submitted that the first defendant, instead of filing the present application within the time prescribed in the last part of the order, had filed an application on 4 October 1988 for an injunction to restrain the plaintiffs from selling the land and goods belonging to the sixth defendant. Also, the first defendant had obtained a Mareva injunction on 28 October 1988 before another judge. It was therefore argued that, having elected to follow other courses instead of filing the present application within the prescribed time, the first defendant was estopped from proceeding with the present application. It was also contended for the plaintiffs that the last part of the order was a peremptory order which should be obeyed by the first defendant.

Held, dismissing the preliminary objection:

(1) Although the ex parte order had been signed by the senior assistant registrar, the court had the inherent jurisdiction to order that the last part of the order be expunged on the ground that it was not prayed for and the court did not make